No. 89-700

In the Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,
Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SHURBERG BROADCASTING OF HARTFORD

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PARTIES TO THE PROCEEDING

Alan Shurberg, a life-long resident of Hartford, Connecticut, was the sole principal of Shurberg Broadcasting of Hartford, Inc. That corporation applied to the Federal Communications Commission ("FCC") in 1983 for authority to construct a broadcast station on Channel 18 in Hartford and initially prosecuted the appeal arising from the FCC's action relative to that application. Mr. Shurberg has, since February, 1989 and pursuant to the FCC's rules, prosecuted the application and the appeal as a sole proprietorship, *i.e.*, Alan Shurberg d/b/a Shurberg Broadcasting of Hartford. Mr. Shurberg, his sole proprietorship, and his corporation are referred to collectively as "Shurberg" herein.

Petitioner Astroline Communications Company Limited Partnership Debtor-in-Possession is a Massachusetts Limited Partnership which has been in Chapter 11 bankruptcy proceedings in United States Bankruptcy Court for the District of Connecticut (Case No. 2-88-01124) since December, 1988.

The Federal Communications Commission is an independent agency charged with regulating the radio airwaves in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION, STATUTES AND REGULATIONS

MISCELLANEOUS

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COUNTERSTATEMENT OF THE CASE

This case involves the Minority Distress Sale Policy of the Federal Communications Commission ("FCC") both on its face and as it was applied below to bar consideration of the application of Respondent Shurberg Broadcasting of Hartford ("Shurberg") for a construction permit for a television station in Hartford, Connecticut. [1]

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[1] References to the Appendix to the Petition for Certiorari are denoted "Pet. App. __". References to the Joint Appendix are denoted "J.A. __". References to materials being lodged with the Court by Shurberg simultaneously with the filing of this Brief are denoted "Resp. Supp. ___".

1. *The Minority Distress Sale Policy*

The Minority Distress Sale Policy ("Policy") was first adopted in 1978. The FCC, acting *sua sponte*, [2] announced that it believed that an increase in minority ownership of broadcast licenses would "inevitably" increase the diversity of programming available to broadcast audiences. *1978 Policy Statement*, 68 F.C.C.2d at 981. [3] Although it stated and re-stated this "inevitability" notion several different ways, the FCC neither articulated nor cited any empirical basis for its belief that program diversity was dependent on race *qua* race. The central issue before the Court is whether this unsupported assumption of the FCC can validate an exclusionary, race-based governmental classification. *See* Petition for Certiorari of Astroline Communications Company Limited Partnership ("Astroline") at *i*; *but see* n. 20, *infra*.

Despite the lack of any demonstrated foundation, the FCC

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[2] *Amici* Congressional Black Caucus *et al.* (collectively, "CBC") incorrectly suggest that the Policy was the result of some "rulemaking" proceeding. CBC Brief at 2. The FCC did *not* undertake any "rulemaking" as defined in 5 U.S.C. §553: no notice of proposed rulemaking was issued, no public comments were solicited on any particular proposals and no report and order was issued. Instead, the FCC simply issued a "Policy Statement" setting forth the Policy. *Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (hereinafter "*1978 Policy Statement*"). While that Statement contains one passing reference to a petition for rulemaking filed by the Congressional Black Caucus, the context of that reference indicates that the FCC believed the Policy Statement to be a rejection of that petition. *Id.* at 983.

[3] The FCC had historically rejected the notion that the race or ethnicity of a broadcast licensee should be considered at all as a factor in the broadcast licensing process, much less that minority ownership would "inevitably" lead to program diversity. *See TV9, Inc. v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974). However, in 1973, the United States Court of Appeals for the District of Columbia Circuit held that the FCC was required to consider minority ownership to the extent that it "is likely to increase diversity of [programming] content." *Id.* at 937-938.

created the Policy and one other policy, both supposedly intended to achieve program diversity through minority ownership of broadcast stations. *See generally, 1978 Policy Statement.* [4] Under the Policy, incumbent licensees about which basic qualifications questions had been raised were permitted to avoid the revocation or license renewal hearing which would otherwise have been necessary, so long as the incumbent licensee elected to sell its station to a "minority buyer" at a "distress sale price". *1978 Policy Statement*, 68 F.C.C.2d at 983. Later in 1978, the FCC emphasized that the Policy would not be available when a competing application was pending for the incumbent licensee's station. [5] *Clarification of Distress Sale*

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[4] The other minority ownership policy adopted in 1978 was the "minority tax certificate policy", under which the FCC grants tax certificates, pursuant to 26 U.S.C. §1071, to non-minority broadcast licensees who sell their stations to minority buyers. The tax certificate permits the seller to defer taxation of the proceeds of the sale. While the tax certificate policy has not been directly challenged in this or any other case, that policy is closely tied in origin, design and rationale, to the Minority Distress Sale Policy. A determination that the latter is unconstitutional would likely be fatal to the former. The Court need not reach this particular question in this case, however.

In addition to the minority tax certificate policy, the FCC has also implemented a "minority preference policy" as part of the comparative broadcast licensing process. Pursuant to the minority preference policy, the FCC gives enhanced comparative credit to applicants for new broadcast construction permits to the extent that such applicants include among their voting principals minorities who commit to be involved in the day-to-day management of the proposed station. The constitutionality of the minority preference policy is at issue in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 58 U.S.L.W. 3427 (January 8, 1990)(No. 89-453).

The minority distress sale, tax certificate and preference policies are sometimes referred to collectively herein as "the minority ownership policies."

[5] The Communications Act, the FCC's Rules and a well-established line of cases provide for the "comparative renewal" procedure pursuant to which an applicant, such as Shurberg, may periodically file an application for a new broadcast authorization specifying the facilities of an existing station. *See, e.g.*, 47 U.S.C. §309(e); 47 C.F.R. §73.3516(e); *New South Media Corp. v. FCC*, 685

(continued...)

Policy, 44 Rad. Reg. 2d (P&F) 479, 480 n.3 (1978). By denying "distress sale relief" in situations involving comparative renewals, the FCC effectively indicated that the public interest benefits flowing from the comparative renewal process override those flowing from the Policy. *Id.*

By its terms, the Policy is available only when the license in question is being transferred or assigned to a "minority" applicant. The term "minority" was originally defined as including "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *1978 Policy Statement*, 68 F.C.C.2d at 980 n.8. [6] It was redefined in 1982 to include "American Indians or Alaskan Natives, Asians and Pacific Islanders, Blacks and Hispanics". *Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 n.1 (1982) ("*1982 Policy Statement*"). The redefinition did not eliminate the practical difficulty of defining any of the particular racial or ethnic terms. [7]

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[5](...continued)
F.2d 708 (D.C. Cir. 1982); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979), *on appeal of remand*, 683 F.2d 503 (1982), *cert. denied*, 460 U.S. 1084 (1983). This procedure arises from the Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Shurberg filed its application pursuant to this well-established authority.

[6] The FCC did not indicate what level of racial or ethnic "extraction" was necessary before an individual could take advantage of the Policy. *Compare Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (Stevens, J., dissenting) (citing First Regulation to the Reichs Citizenship Law of November 14, 1935) *with Storer Broadcasting Co.*, 87 F.C.C.2d 190 (1981)(FCC traces applicant's family history to 1492 to conclude that applicant named "Liberman" is "Hispanic" for purposes of minority tax certificate policy).

[7] For example, the FCC did not define "Hispanic". Webster's New Collegiate Dictionary defines that term as relating to "Spain, Spain and Portugal, or Latin America". Webster's New Collegiate Dictionary, 542 (1975). It appears, however, that Portuguese persons are not "minorities" in the FCC's view, even though they are geographically (if not linguistically and culturally) akin to
(continued...)

2. *The History of This Proceeding*

On December 2, 1983, Shurberg -- whose sole principal is Alan Shurberg, a white male -- filed an application seeking a construction permit for a new television station utilizing the facilities of Station WHCT-TV, Channel 18, Hartford, Connecticut ("Station"). Shurberg's application was filed pursuant to the well-established, statutorily-mandated comparative renewal procedure. *See* n.5, *supra*. Faith Center, Inc. ("Faith Center"), then-licensee of the Station, had previously been designated for a revocation proceeding, but had elected to invoke the Policy. *Faith Center, Inc.*, FCC 80-680 (released Dec. 1, 1980). In September, 1983, the FCC had granted Faith Center "minority distress sale" relief and had terminated the revocation proceeding. *Faith Center, Inc.*, 54 Rad. Reg. 2d (P&F) 1286 (1983). On December 1, 1983, the "window" opened for the filing of competing applications for Connecticut broadcast stations. 47 C.F.R. §§73.3516, 73.1020. [8]

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[7](...continued)
Spanish persons. *See Capital City Community Interests, Inc.*, FCC 86D-44 (Initial Decision) at 59 (released July 6, 1986)("Portuguese descent is not the same as Hispanic, and persons of Portuguese descent are not entitled to any minority enhancement credit"). Resp. Supp. at 2. The FCC has not indicated whether similar distinctions may be drawn between various "Hispanic" sub-groups (*e.g.*, Spaniards, Cubans, Puerto Ricans, Mexicans), or why *any* of those sub-groups is necessarily to be preferred over other non-black ethnic minorities (*e.g.*, Italians, Irish, Jews) who have historically suffered discrimination.

[8] *See Faith Center, Inc.*, 86 F.C.C.2d 891 (1981), where the FCC permitted competing applications with respect to another station held by Faith Center, notwithstanding Faith Center's request that it be allowed to sell that station to a minority-controlled applicant. In that case the competing applicants included entities "with significant minority representation", *id.* at 894, n.14. While the FCC, Astroline *et al.* may suggest various factual distinctions between that case and the instant one, the fact remains that, in 1981, faced with competing applicants "with significant minority representation" and a proposal to sell the subject station to a "minority-controlled" buyer, the FCC accorded to the interest in competing applications dispositive weight; by contrast, in the instant
(continued...)

In March, 1984, Faith Center advised the FCC that the previously approved distress sale had not been consummated. Shurberg then pressed for the prompt designation of a comparative renewal hearing between Shurberg and Faith Center. The FCC took no action on Shurberg's request or on its application.

In June, 1984, some seven months *after* the filing of Shurberg's application, Faith Center sought to take advantage of the Policy again, this time proposing to sell the Station to Astroline. Shurberg opposed the Faith Center/Astroline request for distress sale relief, pointing out, *inter alia*: that the pendency of Shurberg's application rendered distress sale relief unavailable; that Astroline was not a "minority-controlled" entity; [9]

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[8](...continued)
case where the primary factual distinction appears to be that Shurber is not "minority-controlled", the FCC's scales fell on the side of the "distress sale" applicant. *See* Pet. App. 121a (FCC notes that conflict between competing applications and proposed minority distress sale is a "close question"). This suggests that the FCC's decision below in this case might have been different had Shurberg claimed to be minority-controlled.

[9] The showing offered to the FCC by Astroline in support of its claim of "minority control" is included at J.A. 7-9. Contrary to that limited, self-serving, conclusory showing, Shurberg demonstrated to the FCC that, by Astroline's own admission, the sole minority principal of Astroline (and its purported controlling general partner), Richard Ramirez -- a non-black person described by Astroline as a "Hispanic-American", J.A. 7 -- had contributed a total of $210 in cash for his interest in Astroline. J.A. 68-69. As the Astroline partnership agreement did not provide for non-cash capital contributions, Mr. Ramirez' $210 contribution was the only consideration he provided, in return for which he supposedly acquired 21% of the company's overall equity and 70% of its voting equity. J.A. 8. The remainder of Astroline's $10 million in financing (including the Station's $3.1 million purchase price) was to be provided by Astroline's non-minority principals. J.A. 11. According to information Astroline submitted to the FCC in December, 1988, as of that date Astroline's non-minority principals had made capital contributions amounting to approximately $24 million ($24,000,000.00); also as of that date, Mr. Ramirez' contribution remained unchanged at $210. *See* Resp. Supp. at 15.

and that, in any event, the Policy impermissibly discriminated against non-minorities such as Shurberg.

The FCC rejected Shurberg's arguments, concluding instead that the FCC's minority ownership policies were "sufficiently important" to outweigh Shurberg's interest in securing comparative consideration of its application. *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984), Pet. App. 121a. Shurberg appealed that decision immediately.

In its May, 1985 brief and January, 1986 oral argument to the Court of Appeals below, the FCC defended the Policy. However, in September, 1986, while the case was pending before the Court of Appeals, the FCC filed a brief with the Court of Appeals *en banc* in the unrelated case of *Steele v. FCC*, No. 84-1176 (D.C. Cir.)(filed Sept. 12, 1986)("*Steele Brief*"). Resp. Supp. at 16. In its *Steele Brief*, the FCC advised the Court of Appeals that the FCC had concluded that the minority preferences policy was unconstitutional for lack of an adequate supporting record. According to the FCC,

> to the extent that racial and gender preferences may be viewed as a remedy for discrimination, there is no evidence of past discrimination in licensing by the FCC. . . . [And] no record has been established on which to base an assumption that a nexus exists between an owner's race or gender and program diversity.

Steele Brief at 14, 19. [10]

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[10] Before this Court, the FCC has returned to its 1985 position that the minority ownership policies are constitutional. Understandably, the FCC declines to detail in its Brief the "now we see it, now we don't" approach the FCC has taken toward the constitutionality of those policies. As discussed in the text above, since 1973 the FCC has turned 540° on that question: in *TV9*, 495 F.2d at 936, the FCC argued that such policies were contrary to the color-blind principle of the Constitution because program diversity was *not* invariably a
(continued...)

The panel hearing the instant case thereupon ordered, *sua sponte*, the FCC to explain the impact of its position in *Steele* on the constitutionality of the Policy. J.A. 21. The FCC declined to do so, and instead sought remand of the case for further consideration of the constitutional question. J.A. 45. Shurberg and Astroline both opposed any such remand.

While the panel below considered the FCC's remand request, the Court of Appeals *en banc* remanded *Steele*. *See* J.A. 49. The FCC then issued a Notice of Inquiry. *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), J.A. 48, *modified*, 2 FCC Rcd 2377 (1987)("*Steele Inquiry*"). There the FCC indicated a belief that not only the minority preference policy, but also the Minority Distress Sale and Tax Certificate policies, lacked necessary constitutional support. J.A. 56.

In January, 1987, the panel below remanded this case for 90 days "to permit the FCC to resolve its position with respect to the [Station's] license". J.A. 67. After reviewing further comments by Shurberg, Astroline and Faith Center, the FCC reported to the Court of Appeals that

> [t]o the extent that the distress sale policy . . . relies on assumptions that minority ownership will result in increased program diversity, the Commission has . . . concerns as to the constitutionality of the distress sale policy. [*]

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[10](...continued)
result of minority ownership; five years later, the FCC took the opposite tack in the *1978 Policy Statement*; in 1986, the FCC reversed itself again in its *Steele Brief*, *supra*, returning largely to its 1973 position; in 1988, in response to direct pressure from Congress, the FCC reversed itself yet again. The Court may well question the steadfastness and reliability of the FCC's present position, as well as the deference, if any, to which that position might be entitled.

> [Footnote:] Indeed, it could be argued that the distress sale policy presents more difficult questions than comparative preferences. Unlike comparative proceedings where the minority preference is only one of a number of potential comparative considerations, the minority distress sale policy is available *only* to minorities or minority-controlled applicants. Moreover, the comparative preference is available only where the minority owner will be integrated into the proposed station's daily operations. No such requirement exists in the case of distress sales, and the minority owner thus may have no regular involvement in programming decisions or effect on programming diversity.

J.A. 78 (emphasis in original). Despite this apparent concession of the correctness of the position which Shurberg had been advancing for some three years already at that point, the FCC then asked the Court of Appeals again to remand this case permanently for still further agency consideration in connection with the *Steele Inquiry*. In June, 1987, the Court of Appeals (with Judge Silberman dissenting) remanded the record of the case to the FCC, subject to certain conditions. [11]

According to a published news report, Astroline then undertook a major lobbying effort directed to Congress. *Legal Times*, Jan. 18, 1988, at 7, col. 1, J.A. 85. Its purpose appears to have been to secure passage, in the context of appropriations legislation, of a legislative provision designed to protect

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[11] The June, 1987 remand order, and Judge Silberman's dissent, appear at J.A. 81-84. The conditions in that order relating to Astroline's entitlement to any "renewal expectancy" were based on representations which had been made to the Court of Appeals by Astroline and the FCC in response to a motion for stay filed by Shurberg in 1984. The relevant portions of the Astroline and FCC pleadings are included at J.A. 13-17. Demonstrating its apparent determination to support Astroline to Shurberg's detriment, the FCC performed a stunning *volte face* with respect to the extent to which Astroline might rely, in the FCC's view, on the grant of the distress sale application pending completion of judicial review. *Compare* J.A. 14-15 *with* J.A. 79-80.

Astroline's interests against any adverse decision which the FCC or the Court of Appeals might otherwise reach. The result of Astroline's efforts appeared in the Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987)("*1987 Appropriations Act*"), directing the FCC to end the *Steele Inquiry* and to reaffirm the grant of the Faith Center/Astroline distress sale. [12]

Pursuant to the *1987 Appropriations Act*, the FCC abruptly terminated the *Steele Inquiry* and reaffirmed its earlier decision in this case. *Faith Center, Inc.*, 3 FCC Rcd 868 (1988). Since the Court of Appeals had remanded the record of the case to permit the FCC to consider, in the *Steele Inquiry*, whether any record might be compiled in support of the constitutionality of the Policy, and since Congress' action had precluded the compilation of any such record, it was clear that no further purpose would be achieved by the remand. At Shurberg's request, and over Astroline's opposition, the Court of Appeals

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[12] The particular language of the *1987 Appropriations Act*, which related to the FCC's annual appropriation, was:

> [N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue examination of, the policies of the [FCC] with respect to comparative licensing, distress sales, and tax certificates . . ., to expand minority and women ownership of broadcast licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended . . . which were effective prior to September 12, 1986, other than to close [the *Steele Inquiry*] with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

101 Stat. 1329-31. Identical language has been included in appropriations riders in each of the two years since. Pub.L.No. 100-459, 102 Stat. 2186 (1988), Pet. App. 163a; Pub.L.No. 101-162, 103 Stat. 1020-21 (1989), Appendix to Astroline Br. The Senate Report accompanying the *1987 Appropriations Act* instructed that the agency's grant of the Faith Center/Astroline distress sale be affirmed. S. Rep. No. 182, 100th Cong., 1st Sess. (1987)("*1987 Senate Report*") at 77.

withdrew its remand.

In November, 1988, while the case was still *sub judice*, Astroline was placed in involuntary bankruptcy, which Astroline ultimately converted to voluntary status, with Astroline appointed as "debtor-in-possession". To date Astroline remains in that status. [13]

On March 31, 1989, the Court of Appeals issued its decision. Pet. App. 1a. The *per curiam* opinion of the Court reflected the conclusion of Judges Silberman and MacKinnon that the Policy is unconstitutional. The opinion did not provide the FCC with any specific guidance regarding the nature of the proceedings to be undertaken on remand. But both Judges Silberman and MacKinnon clearly recognized in their respective opinions

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[13] Astroline's "debtor-in-possession" status appears to undermine any claim that Astroline might otherwise have to being a "minority-controlled" company. As a "debtor-in-possession", Astroline is subject to trustee-like responsibilities not necessarily consistent with the near-total discretion which the FCC's notion of "minority control" presupposes. *See* 11 U.S.C. §§1106, 1107(a).

The bankruptcy raises further questions about Astroline's claim of "minority control". The record in Astroline's bankruptcy proceeding indicates that, in the course of depositions conducted by counsel for the Creditors' Committee, it was disclosed that the Station's operations had consistently been directed not by Mr. Ramirez in Hartford, but by representatives of Astroline's nonminority principals in Boston. Since Shurberg is not a party to the bankruptcy proceeding, Shurberg does not have full access to all information which may have been developed on this point (although Shurberg understands that Mr. Ramirez is no longer involved in any way with the Station's day-to-day management and no longer resides in Connecticut). Shurberg advised the Senate Telecommunications Subcommittee about the information which had come to its attention as of September, 1989. *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation* (Comm. Print Sept. 15, 1989) at 175-176 ("*1989 Senate Subcommittee Hearing*"). Because Astroline's consistent position since the beginning of this case has been that Astroline is "minority-controlled", a demonstration that it has not been "minority-controlled" would not only gut its arguments, but also indicate that Astroline has advanced fraudulent claims to the FCC, the Court of Appeals and this Court.

Shurberg's right to compete in a comparative proceeding against Faith Center, a licensee of dubious qualifications. *See* Pet. App. 34a-35a, 66a-67a.

Petitions for rehearing and suggestions for rehearing *en banc* were denied. Pet. App. 143a, 155a. The FCC requested and was granted two extensions of time within which to advise this Court of the FCC's position on *certiorari*. The FCC ultimately elected not to seek *certiorari*. Astroline, however, did seek review by this Court. The FCC did not support Astroline in that regard; to the contrary, the FCC opposed Astroline's petition. The Court granted *certiorari* on January 8, 1990.

SUMMARY OF ARGUMENT

The Constitution is color-blind: any governmental classification based on race or ethnicity is inherently suspect and must be subject to the strictest possible judicial scrutiny. Such scrutiny entails a two-step analysis. First, the classification must be directed to a "compelling" interest. Second, the classification must be "narrowly tailored" to address the "compelling" interest to which it is supposedly directed. The Policy fails both elements of this strict scrutiny analysis.

The Policy is said to be directed to two distinct "compelling interests": the correction of "underrepresentation" of "minorities" in the ownership of broadcast stations, and the advancement of "program diversity". Neither of these is sufficient to pass constitutional muster.

The remediation of past discrimination may justify some race-based governmental actions, but only when the underlying discrimination has been the subject of formal findings by a competent forum. Here there are no such findings by any forum and, indeed, the agency which created the Policy has expressly and repeatedly denied both that any discrimination has occurred and that the Policy was intended to remedy any discrimination.

Even if the Policy were deemed, *arguendo*, to be properly directed to the remediation of discrimination, the Policy is not narrowly tailored toward that goal in any rational sense. The benefits of the Policy are available to all "minorities" *regardless* of whether they have been victims of *any* discrimination, much less discrimination in connection with the broadcast licensing process. The Policy is limitless in duration and potentially affects every broadcast license issued by the FCC. In this particular case, the Policy has deprived Shurberg of a substantial opportunity to compete for a valuable television license.

The promotion of program diversity is not a "compelling interest" sufficient to justify race-based classifications. While the free flow of ideas is desirable, that free flow should be achieved *without* content-based governmental regulation. The Policy is clearly and objectionably "content-related", as it is based on the unsupported, racist assumption that, in the quest for program diversity, the content of programming which would be provided by *any* "minority" licensee would be substantively preferable to, or even different from, that which *any non*-minority would provide. Moreover, race-neutral, content-neutral measures have promoted program diversity so effectively that the FCC has abandoned several of those measures because they are no longer necessary.

Even if "program diversity" were a "compelling interest", the Policy is not at all narrowly tailored toward that interest. Neither the FCC nor any of the Policy's supporters has sought to define the concepts of "minority programming" and "minority viewpoint", even though such definitions are essential to assure the proper "narrow tailoring". The Policy requires only that a distress sale applicant allege that it is "minority-controlled"; the Policy imposes no program-related requirements, and it does not even require that the supposedly controlling minority person(s) be involved in any way with the station's programming. The FCC undertakes no *post hoc* monitoring to determine whether, in fact, program diversity is being increased.

The fact that Congress has referred to the FCC's minority ownership policies in certain appropriations riders does not alter the strict scrutiny analysis. Congress' actions fall short of codification of the Policy. Further, it would be inconsistent with Shurberg's due process rights and basic notions of separation of powers to permit Congress to intrude into the on-going adjudication of a private action before an Article III court. But even if Congress is deemed to have properly enacted the Policy, that fact alone would not correct the Policy's multiple constitutional infirmities: Congress has, at most, merely rubber-stamped the FCC's Policy, without attempting either to develop a supporting record for, or to narrowly focus, the Policy.

ARGUMENT

Petitioner, the FCC and various *amici* contend that the FCC's Policy is consistent with the constitutional guarantee of equal protection. That contention is wrong: in view of the very terms of the FCC's policy (as well as its history), the Policy is plainly unconstitutional.

I. Race-Based Governmental Policies Can Be Sustained Only If They Are Narrowly Tailored To Achieve A Compelling Interest Which Is Either Clearly And Particularly Remedial In Nature Or Necessary To Address A Clear And Present Threat To The Public Welfare.

A. *The Minority Distress Sale Policy Is An Exclusionary, Race-Based Governmental Classification Subject To "Strict Scrutiny" Analysis By The Court.*

The FCC's Policy is available *only* to individuals belonging to certain specified minority groups or to entities (*e.g.*, partnerships or corporations) "controlled" by such individuals; stated another way, all *non*-"minority" applicants are absolutely excluded from the beneficial reach of the policy. [14] In this case, application

[14] *See* nn.6, 7, *supra*, and accompanying text for a list of the "minority" groups (continued...)

of that Policy directly and exclusively resulted in Shurberg's rejection by the FCC. *Faith Center, Inc., supra*, Pet. App. 121a-122a. As a result, the policy is inconsistent, on its face and as applied to Shurberg, with the fundamental constitutional principle of equal protection which guarantees, to each individual, governmental decision-making unaffected by such suspect factors as skin color and national origin. *See City of Richmond v. Croson*, 109 S.Ct. 706, 727 (1989); *Brown v. Board of Educ.*, 347 U.S. 483, 493-95 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)(Harlan, J., dissenting)("Our Constitution is color-blind"). The Policy is therefore highly suspect. *See*, *e.g.*, *Croson*, 109 S.Ct. at 721 (O'Connor, J.); *Loving v. Virginia*, 388 U.S. 1 (1967).

The presumptive invalidity of any such suspect governmental classification may be overcome if it can pass muster under the "strict scrutiny" standard of judicial review. *E.g.*, *Croson*, 109 S.Ct. at 721 (O'Connor, J.) [15]; *Loving*, 388 U.S. at 11 (1967).

[14](...continued)
eligible to take advantage of the Policy.

[15] The Chief Justice and Justices White and Kennedy joined in that portion of Justice O'Connor's opinion in *Croson* in which the "strict scrutiny" analysis was expressly articulated. Justice Scalia also expressly concurred on that point. 109 S.Ct. at 735 (Scalia, J., concurring in the judgment).

Justice Stevens has not expressly endorsed a specific articulation of the "strict scrutiny" analysis. He has, however, indicated that courts have a "special obligation to scrutinize" legislative activity leading to classifications based on race. *See Fullilove*, 448 U.S. at 548 (Stevens, J., dissenting).

Justices Brennan, Marshall and Blackmun have stated that, in their view, remedial use of race is permissible "if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-02 (1986)(Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.). While this standard is significantly more relaxed than the "strict scrutiny" which has been endorsed by at least five members of the Court, the Policy is so wholly unconnected to any arguable "important objective" that it fails to pass even that relaxed test. *See* (continued...)

That standard requires that the classification's proponent demonstrate that the policy is "narrowly tailored" to the accomplishment of a "compelling" governmental purpose. *E.g.*, *Wygant*, 476 U.S. at 273-74 (Powell, J.); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). [16] In the instant case, the Policy is not directed to any such governmental purpose. Further, even if that policy were deemed *arguendo* to satisfy the first phase of strict scrutiny analysis, it clearly fails to satisfy the second.

B. The "Compelling Interest" Supposedly Legitimizing A Racial Classification Must Be Either Clearly And Particularly Remedial Or Necessary To Address A Clear And Present Threat To The Public Welfare.

Before strict scrutiny can be undertaken, it is necessary to identify what types of interest are sufficiently "compelling" to justify an otherwise obvious violation of the Constitution. Mere assertions of authority under, *e.g.*, the Commerce Clause or the Spending Clause are unavailing for this purpose, because the guarantee of equal protection is itself a condition on those other

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[15](...continued)
infra at 27-33, 38-43.

[16] The two-prong strict scrutiny analysis applies equally to both state and federal actions. *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976). The constitutional guarantee of equal protection is, after all, personal in nature, assuring to each individual citizen equal treatment at the hands of the government, whether that government is local or national. *See Bolling v. Sharpe*, 347 U.S. 497 (1954); *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring)("There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."). The identity of the governmental entity may affect the ultimate resolution of the equal protection question, since some interests which may be "compelling" for one governmental body may not be equally so for another. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). *See also Croson*, 109 S.Ct. at 719 (O'Connor, J.). Nevertheless, the analytical elements themselves are applicable irrespective of the governmental entity in question.

sources of Constitutional power. That is, Congress has broad authority to act pursuant to its Article I powers *as long as* such action is consistent with the guarantee of equal protection. *See Oregon v. Mitchell*, 400 U.S. 112, 129 (1970)(Black, J.)("every provision of the Constitution [,] was expressly qualified by the Civil War Amendments' ban on racial discrimination"); *cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 732-33 (1982)("neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment"); *Fullilove*, 448 U.S. at 548 (Stevens, J., dissenting)("the exercise of [Congress'] broad [Article I] powers is subject to the constraints imposed by the . . . Fifth Amendment"). To hold that Congress could ignore the requirement of equal protection simply by asserting authority under the Commerce or Spending Clause would render the concept of equal protection a nullity.

Section 5 of the Fourteenth Amendment does provide Congress with additional authority specifically to enforce the protections of that Amendment through some types of remedial race-based programs. *E.g.*, *Fullilove*, 448 U.S. at 476-77 (Burger, C.J.). That authority, however, authorizes Congress only to enforce Section 1 of the Amendment, which governs only *State* conduct. No State action is or could be involved here: broadcast licensing has invariably been deemed a matter under Federal control in which the States have no role. *See* the Communications Act of 1934, 47 U.S.C. §§151 *et seq.*; Radio Act of 1927, 44 Stat. 1162. Thus, it is not at all clear that the supplemental Congressional authority embodied in Section 5 of the Fourteenth Amendment may properly be invoked with respect to broadcast licensing activities of the FCC. [17]

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[17] That this case arose from the FCC, a non-elected, independent Federal agency, has further impact on the factors which may appropriately be considered here. First, since no State legislative conduct at all is involved, the Federal action here is not entitled to deference flowing from considerations of Federalism. *See, e.g.*, *Croson*, 109 S.Ct. at 735-36 (Scalia, J., concurring in the judgment).

(continued...)

But even if the Fourteenth Amendment does empower Congress to act with respect to the FCC, the resulting authority is not a boundless license to ignore the basic, color-blind principles underlying both the Fourteenth Amendment and the Constitution itself. Any governmental effort to "remedy" discrimination requires as a predicate the clear identification, in formal findings by a competent body, of the constitutional or statutory violations to which the "remedy" is directed.[18] *See*

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[17](...continued)

Similarly, the non-legislative character of the Policy renders irrelevant any notion that "discrete and insular minorities" may warrant greater protection in the legislative process. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Some *amici* argue that that notion may be extended to justify different standards of judicial review based on the race or ethnicity of the party involved. Brief of National Bar Association ("NBA") at 26-27; Brief of *Amici* American Civil Liberties Union *et al.* (collectively, "ACLU") at 18-19. Such an extension was rejected by the plurality in *Croson*, 109 S.Ct. at 721-22 (O'Connor, J., joined by Rehnquist, C.J. and White and Kennedy, JJ.), quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 289-90 (Powell, J.)("[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color"). *See also Craig v. Boren*, *supra*, 429 U.S. at 211-12 (Stevens, J.). But the Court need not reach this question here because the Policy at issue is the creation of a non-elected administrative agency. To the extent that the Policy might, *arguendo*, be deemed to have been "adopted" in some form by Congress, the *Croson* plurality's view would be apposite: the concept of equal protection is a limitation applicable *uniformly* to governmental conduct irrespective of the race or ethnicity of the parties before the Court.

Finally, the FCC's conclusions concerning the constitutionality of the Policy are entitled to no deference whatsoever, since the FCC has no expertise in the area of civil rights. Importantly, the Executive Branch office which *does* have such expertise – the Department of Justice – has concluded that the FCC's minority ownership policies are unconstitutional. *See*, *e.g.*, Comments of Department of Justice submitted to the FCC on June 10, 1987 in the *Steele Inquiry*, Resp. Supp. at 47. A conclusion by the Executive Branch regarding a question of constitutionality is entitled to no less deference than might be accorded to a corresponding conclusion by the Legislative Branch.

[18] While Justice Scalia did not join in the majority opinion on this point in *Croson*, his concurring opinion there indicates that he, too, views the specific (continued...)

Croson, 109 S.Ct. at 724, *citing Wygant*, 476 U.S. at 274-75. An assertedly remedial racial classification can satisfy the required strict scrutiny analysis *only* if some record has been developed reflecting a prior history of unlawful discriminatory conduct, the effects of which are to be remedied.

No other interests which might be so "compelling" as to justify race-based classifications have been endorsed by the Court. Justice Powell suggested that an avowedly benign effort to assure "diversity" in a student body might be sufficient. *Bakke*, 438 U.S. at 311-12. *See also Croson*, 109 S.Ct. at 730-31 nn.1, 2 (Stevens, J., concurring). But that general view runs afoul of the color-blind nature of the Constitution in much the same way that *Plessy v. Ferguson*, *supra*, ran afoul of it: such benign efforts result *not* in the elimination, but in the *reinforcement*, of odious racial stereotypes and animosities. *See Fullilove*, 448 U.S. at 531 (Stewart, J., dissenting); *Croson*, 109 S.Ct. at 739 (Scalia, J., concurring in the judgment). Moreover, this ostensibly benign approach itself could and likely would itself lead to invidious discrimination. [19]

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[18](...continued)

identification of discrimination as an essential predicate to any supposedly remedial legislative efforts. *Croson*, 109 S.Ct. at 738 (Scalia, J., concurring in the judgment).

See also Justice Powell's concurring opinions in *Fullilove*, 448 U.S. at 497-498 (Powell, J., concurring) ("[T]his Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. . . . Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred.") and *Bakke*, 438 U.S. at 308-09 ("[w]ithout [judicial, legislative or administrative] findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. . . .")(foonote omitted). *See also Wygant*, 476 U.S. at 274-78 (plurality opinion of Powell, J.) and 295 (White, J., concurring in the judgment).

[19] For example, in order to achieve supposedly desirable "diversity" even in (continued...)

This is not to say that the government is *absolutely* prohibited from any non-remedial consideration of race and ethnicity. Even the clearest and seemingly most absolute Constitutional prohibitions have been held to be subject to safety valve exceptions necessary to protect against immediate threats to the public welfare. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 216, 220 (1944)("pressing public necessity" involving "circumstances of direst emergency and peril" may justify race-based classifications). *See also Abrams v. United States*, 250 U.S. 616, 627 (1919)(Holmes, J., dissenting)(exceptions to First Amendment permitted in face of "immediately dangerous" "emergenc[ies]"). Thus, for example, temporary racial segregation within a prison subject to racial tension may be acceptable. *Cf. Lee v. Washington*, 390 U.S. 333 (1968). Similarly, consideration of race in the selection of undercover police investigators may also be acceptable in some limited (and temporary) instances for the necessary advancement of the criminal justice system. *Cf. Croson*, 109 S.Ct. at 731 n.2 (Stevens, J., concurring). But apart from such extraordinary situations, and apart from the limited remedial situations discussed above, the government is constitutionally prohibited from acting on the basis of race or ethnicity. U.S. Const. amend. V, XIV.

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[19](...continued)
academic environments, it might be necessary to *limit* certain ethnic groups (*e.g.*, Asians) which, for one or another valid, non-discriminatory reason, had theretofore been successful in securing placement in such environments in greater numbers than other ethnic groups. After all, the notion that there exists a particular desirable level of "diversity" with respect to any finite or scarce universe (whether it is the universe of available places in a student body or available broadcast licenses) perforce means that, to achieve that desirable level, the scarce universe must be allocated according to a quota system which will necessarily exclude some to include others. *See* Los Angeles Times, Dec. 1, 1988, at 3, col. 1 ("Aide Sees Hints of Colleges' Asian Bias"). *See also* Rohrabacher, The Heritage Lectures, No. 216 (Sept. 19, 1989)(discussing H.Con.Res.147).

It is urged on this Court by Astroline, the FCC and various *amici* that two separate governmental interests underlie the Policy: first, the correction of "underrepresentation" of minorities in the ownership of broadcast facilities (*e.g.*, Astroline Br. at 26 n.11; FCC Br. at 26-28), and second, the "advance[ment of] diversity" in programming by increasing minority ownership of broadcast stations (*e.g.*, Astroline Br. at 19-20, FCC Br. at 34). [20] Neither of these supposed purposes can withstand the requisite strict scrutiny. Thus, the FCC's Policy is clearly unconstitutional.

II. The Minority Distress Sale Policy Is Not Intended To Remedy Any Identified Discrimination And It Is Not, In Any Event, Narrowly Tailored To Effect Any Such Remedy.

A. *The Policy Is Not Directed To Any Identified Discrimination.*

Astroline, the FCC and *Amici* ACLU and CBC assert that the Policy is a remedial effort directed to some "discrimination" which is said to account for the historical "underrepresentation" of minorities in the ownership ranks of the broadcasting industry. *E.g.*, Astroline Br. at 26 n.11; FCC Br. at 27-28. As discussed *supra* at 16-20, before they may be deemed to be

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[20] In its Petition for Certiorari, Astroline elected *not* to rely on any claim that the Policy may have been intended to remedy the effects of past discrimination. Rather, Astroline's "Question Presented" is whether that Policy may be sustained solely as an effort to promote diversity in programming. Astroline Pet. at *i*. Straying from the narrow course it itself charted in its Petition, Astroline discusses the supposedly remedial aspects of the Policy, Br. at 23-26. Similarly, *Amici* CBC and ACLU claim that the Policy may be constitutionally justified as a remedial measure. CBC Br. at 18-24; ACLU Br. at 8-10. While the Court did not grant *certiorari* on that particular question, Shurberg responds to it herein in order to demonstrate that the Policy *cannot* legitimately be viewed as a constitutionally acceptable remedial program. Shurberg notes that it has *never* been suggested by *anyone* that the Policy is necessitated by extraordinary circumstances involving clear and imminent danger to the public welfare.

directed to a "compelling interest", supposedly remedial, race-based, governmental actions must, as a necessary predicate, be supported by some formal finding of actionable discrimination. The history of the Policy reveals no such finding by the FCC, Congress or any court. Indeed, *any* assertion of the supposedly remedial purpose of the Policy is directly contradicted by the FCC's own statements.

In adopting the Policy in 1978, the FCC made clear that the policy was intended simply to promote diversity of program content. *1978 Policy Statement*, 68 F.C.C.2d at 981. No mention at all was made of "discrimination" of any sort, and it was not suggested that the policy was intended to remedy the effects of *any* discrimination. At most, the FCC expressed concern about an apparent "lack of minority representation in the ownership of broadcast properties". *Id.* The FCC did not ascribe that perceived "lack" to any particular source, discriminatory or otherwise. [21]

Consistently, the FCC advised the court below that the FCC's "primary goal [of the Policy] is *not* to remedy past discrimination." Brief for FCC at 30, *Shurberg Broadcasting of Hartford, Inc. v. FCC*, (D.C. Cir. No. 84-1600, filed May 15, 1985)(emphasis added). In fact, the FCC has disclaimed, expressly and unequivocally, any discrimination in the licensing processes of that agency. *Steele Brief* at 17-18 ("There has never been a finding, nor so far as we know even an allegation, that

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[21] In fact, the FCC has identified the lack of financial opportunities as the main obstacle to increased minority participation in broadcast ownership. *Strategies for Advancing Minority Ownership in Telecommunications, Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications* (1982). *See also Minority-Owned Broadcast Stations: Hearing on H.R. 5373* Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess., 67 ("*1986 House Subcommittee Hearing*") (then-Chairman Fowler testifying that "number one, two and three problems [inhibiting increased minority ownership] are money, money, money.").

the FCC engaged in prior discrimination against racial minorites [sic] or women in its licensing process."). Moreover, *no* identified discrimination by *any* individual or entity (governmental or otherwise) has been formally alleged to which the statistical "underrepresentation" might be attributed. It is therefore clear that the Policy was neither designed nor implemented by the FCC to serve as a remedy for any identified past discrimination.

Citing limited language in a Conference Report accompanying certain 1982 amendments to the Communications Act of 1934, Astroline, the FCC and *amici* suggest that the FCC's minority ownership policies as a whole (including the Minority Distress Sale Policy) are remedial measures directed against some historical discrimination. *See, e.g.*, Astroline Br. at 26 n.11; FCC Br. at 24, 27-31; CBC Br. at 18-24. [22] The 1982

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[22] No examples of "discrimination", either incidental or systemic, are described in any of the briefs here. At most, it is suggested that societal discrimination may have prevented blacks from acquiring broadcast licenses in the earliest days of the industry, when the white-dominated ownership pattern is said to have been established. *E.g.*, FCC Br. at 30-31; CBC Br. at 19-21. But this claim ignores the fact that there is substantial turnover of broadcast licenses -- approximately 9% of all broadcast licenses are sold in any given year (based on averages over the past 10 years). *See* Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988). Thus, even if the initial distribution of licenses were somehow improperly skewed, that distribution has been subject to substantial (if not near total) change over the course of the last 40-50 years. Any supposed pattern of discrimination would have had to have infected *not* just the initial distribution, but also the subsequent transfers of all licenses. Neither Astroline, nor the FCC, nor any *amici* allege any such universal infection. Nor could they: minorities have been involved in a significant number of such transactions. For example, one prominent black broadcaster has recently stated in a comparative licensing proceeding before an FCC ALJ that he has bought and sold some 50 broadcast stations since 1972. Declaration of Ragan A. Henry, Attachment to Opposition to Motion to Enlarge, submitted January 30, 1990 in MM Docket No. 88-429. *See* Resp. Supp. 90. *See also* n.48, *infra* (minority-owned company acquired two television stations and 11 radio stations since 1986). This hardly reflects rampant discrimination or non-availability of licenses to minorities.

A further flaw in the "remedial" claim is that it assumes that, if minorities

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amendments did *not* involve the Minority Distress Sale Policy. Rather, they involved a "preference" scheme for the awarding of new licenses through a lottery procedure in which competing applicants would be entitled to certain "preferences" based on race and/or ethnicity. The policy then under consideration by Congress did *not* absolutely exclude non-minorities, as does the Minority Distress Sale Policy; instead, it provided for consideration of race as one of a number of comparative factors in the licensing process. [23] In fact, none of the 1982 legislative history contains *any* reference to the Policy. Since neither the design nor the implementation of the Policy was before the Conferees, expressly or by implication, the cited language is of questionable relevance to the instant case.

With respect to "discrimination", the Conferees said only that

> the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the

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[22](...continued)
had acquired stations 40 years ago, those minorities would have retained the stations or would have sold them only to other minorities. Both premises are equally improbable. *See, e.g., NEWSystems of Pennsylvania, Inc.*, 2 FCC Rcd 73 (1987)(two months after acquiring a station based on, *inter alia*, claimed benefits of minority ownership and program diversity, minority licensee sells the same station to non-minority buyer). *See also* n.49, *infra*.

Finally, claims of historical societal discrimination against blacks, even if true, do not explain why the FCC's policies are available equally to Hispanics (the purported minority group at issue in this case), Asians and Eskimos, or why they are not available to other groups (*e.g.*, Irish, Italians, Jews) who may have suffered similar discrimination. *See also* n.7, *supra*.

[23] This is not to say that the Congressional language cited by *Amici* would be sufficient to support even the supposedly non-exclusionary comparative preference policies. As discussed above, the Conferees' cursory reference to "discrimination" does not provide an adequate basis for *any* race-based policy.

economy as well.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. at 43 ("*1982 Conference Report*"). The Conferees did not explain, in particular or in general, what those "past inequities" might have been, when they might have occurred, or who might have been responsible for them. In support of their blanket, conclusory assertion of underrepresentation, the Conferees cited only the raw percentages of radio and television broadcast licenses then held by minorities, without any reference to the number of qualified minorities interested in acquiring such licenses. *Id.* at 43-44. [24] But it cannot seriously be argued that 100% of the entire population of the United States (or 100% of any discrete "minority" portion thereof) is qualified to acquire, or interested in acquiring, a broadcast license. Thus, the Conferees' comparison of the percentage of "minority" broadcast owners with the percentage of "minorities" in the general population is the type of meaningless "apples and oranges" statistical comparison which has been specifically rejected by the Court. *E.g., Croson*, 109 S.Ct. at 725; *Hazlewood School Dist. v. United States*, 433 U.S. 299, 308 (1977).

In passing, the 1982 Conferees also cited generally to only three other sources: (1) the FCC's *1978 Policy Statement* which (as noted above) contained no reference at all to discrimination; (2) a Report on Minority Ownership prepared by an FCC Taskforce, which referred only to general "societal discrimination", without more, as an apparent basis for the noted "underrepresentation" [25]; and (3) this Court's opinion in

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[24] In its Brief the FCC effectively confirms this observation: it refers to remarks by various members of Congress, *none* of whom mentions any statistical comparison other than percentage of minority-owned stations v. percentage of minorities in the general population. FCC Br. at 25 n.23.

[25] The Taskforce Report referred only to the term "general societal discrimination" when it addressed possible sources of the underrepresentation.
(continued...)

Fullilove "and reports cited therein at 467 n.55". *1982 Conference Report* at 44. *Fullilove*, of course, involved a set-aside program designed to benefit minorities in the *construction* industry; none of the various opinions in that case included any information about discrimination of any sort in the licensing of broadcast stations. The reports cited at Footnote 55 of Chief Justice Burger's opinion similarly included no information about any such discrimination. *Fullilove*, 448 U.S. at 467 n.55. [26] To argue that the *1982 Conference Report* itself demonstrates that the Policy is remedial is thus nothing more than "bootstrapping": in support of their lone reference to "discrimination", the Conferees relied on sources which did not themselves identify *any* discrimination in the broadcast licensing process.

Thus, despite the *en passant* incantation of the term "discrimination" in one conference report eight years ago, there in fact is absolutely no judicial, legislative or administrative record of identified discrimination -- by the FCC or any other entity -- in the broadcast licensing process. [27] At most, the

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[25](...continued)
FCC Minority Ownership Taskforce, Report on Minority Ownership in Broadcasting, 7-9 (1978). Notwithstanding the Taskforce's references to "societal discrimination", however, the FCC chose *not* to rely at all on "discrimination" of *any* type as a basis for the Minority Distress Sale Policy or the *1978 Policy Statement*: as discussed in the text above, the FCC sought to justify the Policy *only* as an effort to increase program diversity. In this respect it is important to recognize -- as *Amicus* NABOB fails to do (*see* NABOB Br. at 20-22) -- that the Taskforce was an entity separate and distinct from, and subordinate to, the FCC.

[26] In fact, the reports cited by Chief Justice Burger reflect Congress' concern that set-aside programs be available *not only* to "minorities", but to *all* "socially and economically disadvantaged persons". *E.g.*, S. Rep. No. 31, 95th Cong., 2d Sess. 107 (1979).

[27] Significantly, in Conference Reports pre-dating and post-dating the *1982 Conference Report* relied on by Astroline and its supporters, there is no (continued...)

record reflects a single Congressional reference to amorphous societal discrimination. But an "amorphous claim [of past discrimination] cannot justify the use of an unyielding racial quota" because such a claim "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy". *Croson*, 109 S.Ct. at 723. [28]

B. *The Policy Is Not "Narrowly Tailored" To Remedy Any Supposed Discrimination.*

Even if the remediation of some supposed non-specific discrimination might, *arguendo*, be deemed a "compelling" interest sufficient to survive the first hurdle of the strict scrutiny test, in order to survive the second hurdle the Policy would still have to be "narrowly tailored" to remedy that alleged discrimination. In assessing whether a remedy is narrowly tailored in this context, the Court has considered a number of factors: the necessity for the relief and the availability of other non-race-based alternative remedies; the relationship of the scope of the remedy vis-a-vis the number of potentially affected minorities in the relevant market; the effect of the remedy on

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[27](...continued)
reference at all to "discrimination" of any sort. In 1981 Congress enacted an earlier version of the "lottery preference" system which was revised in the 1982 amendment. But the Conference Report accompanying the 1981 amendment makes no mention of "discrimination". H.R. Rep. No. 208, 97th Cong., 1st Sess (1981) ("*1981 Conference Report*"). Similarly, in the Conference Report accompanying the *1987 Appropriations Act* on which Astroline now relies, *see* Astroline Br. at 27-28, there is no mention of "discrimination" and no indication that Congress believed or intended the FCC's minority ownership policies to be "remedial" in any sense.

[28] *See also Wygant*, 476 U.S. at 274, 276 (plurality opinion of Powell, J.) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification. . . . In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.")

third-parties; the stated duration of the remedy; and the availability of waiver provisions. *E.g.*, *Local 28 v. EEOC*, 478 U.S. 421, 475-81 (1986); *Fullilove, supra*. The Policy fails under each of these considerations.

1. *The Broad Sweep Of The Policy Is Clearly Not Necessary, Nor Even Rationally Related, To The Remediation Of Any Supposed Discrimination.*

As discussed above, in adopting the Policy, the FCC never purported to be attempting to remedy any discrimination. Because of this, the FCC cannot be said to have considered alternative possible remedies: if, as is apparent from its own statements, the FCC did not think that it was trying to remedy "discrimination", it could not be expected to consider other approaches more narrowly tailored for such a purpose.

It is clear in any event from the breathtaking scope of the Policy that it could not reasonably be construed as remedial in nature. The Policy is available not merely to minority individuals who are demonstrated victims of discrimination. Rather, the Policy is available across-the-board to *all* members of the particular racial or ethnic groups irrespective of, *inter alia*: whether they have been victims of *any* form of discrimination or related disadvantage (much less any "discrimination" in connection with the broadcast licensing process) [29]; whether they have previously taken advantage of the FCC's minority

[29] In this regard the Policy may be contrasted with the set-aside approved by the Court in *Fullilove*. Here, the FCC requires no showing that a distress sale applicant has been the victim of any discrimination, and, indeed, no such showing was made by Astroline (which described Mr. Ramirez merely as "a Hispanic-American", J.A. 7). In *Fullilove*, Chief Justice Burger emphasized that the legislative record underlying the set-aside in that case contained clear direction that that set-aside would be available *only* to "such minority individuals as are considered to be economically or socially disadvantaged". *Fullilove*, 448 U.S. at 471 (Burger, C.J.).

ownership policies; whether they are residents of (or have any connection at all with) the station's community of license; whether that community includes *any* significant population of *any* of the benefited minority groups; whether that community includes *any* representatives of the minority group to which the particular individual seeking to avail himself or herself of the Policy supposedly belongs. All of these factors underscore the Policy's substantial lack of "remedial" characteristics.

But there is more. The Policy is available not only to individual members of the specified minority groups, but also to business entities said to be controlled by such individuals. *See, e.g., 1982 Policy Statement*. But with very limited exceptions (*e.g.*, sole proprietorships and the like), a business organization such as a partnership or corporation cannot legitimately be said to hold a uniquely *personal* attribute such as race or ethnicity, especially when eligibility for governmental programs and benefits depends on the supposed attribute. If a governmental policy is "remedial", then it should truly remedy those who have been victims; it should *not* serve as an incentive to subterfuge by which non-victims enjoy undeserved and inappropriate windfalls.

But even if some such attribution may be justifiable based on the race of the entity's "controlling" principal, the FCC's standards for determining whether "control" exists are not designed to assure that the minority individual is in fact in control. The instant case demonstrates this. Although purportedly a minority-controlled limited partnership, Astroline's ownership structure belies that claim: according to the FCC's records, Astroline's supposedly "controlling" minority individual, who is now said by Astroline to own 21% of Astroline's overall equity and 100% of its voting control, acquired that interest for a total capital contribution of $210 (two hundred and ten dollars); by contrast, the non-minority principals of Astroline acquired their partnership interests by capital contributions amounting in the aggregate to more than $24 million ($24,000,000.00). J.A. 7-8, 68-69; Resp. Supp. 3-15. That is, non-

minorities have contributed more than 99.999% of Astroline's capital. [30] *See also* n.13, *supra*.

To claim that Astroline is "minority-controlled" under these circumstances is clearly inconsistent with normal business practice, experience and expectations. Nevertheless, the FCC accepted Astroline's self-serving claims without further inquiry. The FCC thus demonstrated that the Policy, far from remedying any identifiable discrimination, in fact operates to permit non-minorities to form "front" or "sham" entities nominally controlled by minorities, but in fact controlled by those *non*-minorities seeking to enrich themselves through the FCC's minority ownership policies. [31]

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30 The disparity in actual contributions is particularly striking because it is inconsistent with Congress' own understanding of what constitutes a minority applicant. In the *1982 Conference Report* relied on by Astroline, the FCC and *amici*, the Conferees specifically limited the reach of the minority preference plan there under consideration to entities "a majority of whose ownership interests are held by a member or members of a minority group." *1982 Conference Report* at 44. The Conferees instructed the FCC to "evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership." *Id.* at 45. They also twice defined "controlling interest" as constituting "over 50 percent". *Id.* at 43. Thus, whether Astroline's claimed ownership structure (*i.e.*, supposedly 21% minority ownership) or its beneficial structure (*i.e.*, 99.999% nonminority contributions, 0.001% minority contribution) is considered, it is clear that Astroline could not be deemed to be a minority applicant as Congress understood that term.

31 Practically, the factors of profits and enrichment are important, if unstated, aspects of the minority ownership rules. One station purchased by a minority-controlled applicant pursuant to the Policy for approximately $3.4 million in 1980 (*Broadcasting Service of America, Inc.*, 48 Rad. Reg. 2d (P&F) 456 (1980)) was sold in 1986 for approximately $35 million. *See* Resp. Supp. 92-106. Another station (and an associated "satellite" station), purchased pursuant to the Policy in 1980 for $3 million (*Grayson Enterprises, Inc.*, 77 F.C.C.2d 156 (1980)), was sold in 1985 for $16.5 million. *See* Resp. Supp. 107-21. *See also* n.36, *infra* (describing minority tax certificate worth approximately $100 million).

2. *The Policy Is Virtually Unlimited In Scope And Duration And Contains No Provision For Waiver.*

The universe of broadcast licenses potentially subject to the Policy is virtually unlimited: the FCC has the authority to designate each and every broadcast license for a revocation or renewal hearing, thus making *all* outstanding broadcast licenses subject to the Policy. *See* 47 U.S.C. §§307(c), 312. [32] This is a far cry from the extremely limited and well-defined minority set-aside approved by the Court in *Fullilove*. *See Fullilove*, 448 U.S. at 514 (Powell, J., concurring).

Similarly, the FCC has imposed no termination date for the Policy. The Policy has been in effect for 12 years already, and the FCC appears inclined to continue it indefinitely. [33] Again,

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32 Astroline, the FCC and *amici* argue that the Policy has thus far been applied in only a limited number of cases. *E.g.*, Astroline Br. at 30-31; FCC Br. at 43-44. From this they suggest that the Policy's extreme reach may somehow be ignored. But that reach cannot be ignored: in formulating the Policy, the FCC elected not to impose any limitations on the number of stations which would be subject to it, the FCC has never suggested that the Policy may be subject to any such limitations and, in view of the *1987 Appropriations Act* (*see* n.12, *supra*), the FCC is now statutorily precluded from "apply[ing] changes in" the Policy in order to impose such limitations. The Court must review the Policy as that Policy has actually been articulated, not as Astroline and its supporters would prefer the policy to have been articulated. And in any event, even if Shurberg were the *only* party to suffer from the discriminatory effects of the Policy, "[t]he rights of every man are violated when the rights of one are diminished." Pet. App. 69a (MacKinnon, J., citing President John F. Kennedy).

33 This inclination is illustrated here. Despite the fact that no stay of the mandate of the Court of Appeals has been sought or granted, the FCC has repeatedly refused to rescind the minority distress sale at issue in this case. *See, e.g.*, Shurberg's Motion for Leave to Withdraw Brief in Opposition to Petition for Certiorari, filed January 2, 1990, at 3-4. Indeed, the FCC even advised the Court of Appeals below that the FCC intended to leave Astroline in place as the Station's licensee *irrespective* of whether the FCC might ultimately conclude the Policy to be constitutionally flawed. *Compare* J.A. 79-80 (particularly

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this is dramatically different from the minority set-aside approved in *Fullilove*, where the race-based program would "not last longer than the discriminatory effects it [was] designed to eliminate." *Fullilove*, 448 U.S. at 513 (Powell, J., concurring). Of course, if the FCC intended to maintain the Policy until some particular percentage of minority broadcast ownership is achieved, the Policy would be "facially invalid". *Bakke*, 438 U.S. at 307 (Powell, J.).

Moreover, the Policy includes no provision for challenging the appropriateness of any particular distress sale: if an applicant satisfies the FCC's broad-brush definition of "minority", that applicant can take advantage of the Policy regardless of any other attributes (*e.g.*, clear lack of economic disadvantage or historical victimization on the basis of race, apparent "sham" structure featuring minimal actual minority involvement) which might undermine the supposed remedial effect of the Policy. While Astroline asserts that the FCC's review of each proposed distress sale protects against potential abuse, Astroline Br. at 41-43, the facts of this case reveal that the FCC's review was (and remains) almost non-existent. *See* n. 9, *supra*. [34] This is

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[33](...continued)
footnote 2 therein) *with* J.A. 14-15.

[34] The FCC does have some institutional familiarity with the notion of "sham" applications. *See*, *e.g.*, *Susan S. Mulkey*, 3 FCC Rcd 590, 592, ¶16 (Rev. Bd. 1988). That familiarity relates to efforts, in the comparative licensing process, to take advantage of the comparative preference policy. The identification of shams in that context, however, is not attributable to the FCC. In comparative cases, competing applicants are permitted to test the validity of each others' claims through formal discovery and cross-examination. It is through such efforts by private parties that bogus claims of "minority control" are identified; the FCC itself does virtually nothing to identify shams. By contrast, an opponent of a distress sale application (for example, Shurberg) is given no discovery or cross-examination rights. And when, despite that, an opponent is able to present to the FCC persuasive evidence of a "sham" in this context, the FCC simply ignores it, as occurred below.

completely distinct from the set-aside program in *Fullilove*, which contained an explicit waiver provision designed to assure that the set-aside would be available to minority persons only when they were "economically or socially disadvantaged". *See*, *e.g.*, *Fullilove*, 448 U.S. at 470-71 (Burger, C.J.).

3. *The Policy Has An Acute Adverse Impact On Non-Minorities.*

Astroline, the FCC and various *amici* attempt to belittle the nature and extent of the adverse impact which the Policy has on non-minorities. *E.g.*, Astroline Br. at 30-33; FCC Br. at 41-46. Their argument is, however, misdirected.

Unlike the construction contracts at issue in *Fullilove*, broadcast licenses are unique -- the opportunity to file for a television station in Hartford, Connecticut is clearly distinct from the opportunity to file for a low-power AM station in a small rural community. Shurberg's sole principal is a life-long resident of Hartford who was, and remains, interested in obtaining the Station's license. Aware of the longstanding, statutorily-mandated, judicially-endorsed comparative renewal process, and aware that Faith Center's previous disqualifications would make it an easy target in a comparative renewal challenge, he sought to take advantage of that process.

The FCC's Policy prevented him from doing so. As Judge MacKinnon correctly observed below, this case involves a "rare opportunity . . . to attempt to obtain a license in a particular market. The distress sale program takes this opportunity away from every individual who is not classified as a minority as defined by the FCC." Pet. App., 67a. [35]

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[35] *See also* Pet. App. 35a (opinion of Silberman, J.)(". . . [Shurberg] has been absolutely denied an opportunity to compete for [a Hartford television station] merely because of his race. A chance to compete for a license elsewhere in the country is not an equivalent opportunity for Shurberg.")

III. Program Diversity Is Not a "Compelling Interest" Sufficient to Legitimize the Minority Distress Sale Policy and, in Any Event, That Policy Is Not "Narrowly Tailored" to Accomplish the Goal of Program Diversity.

A. *"Program diversity" Is Not A "Compelling Interest" Necessitating Race-Based Classifications.*

Astroline, the FCC and various *amici* argue that the Policy is constitutional because it is intended to increase diversity in programming. *E.g.*, Astroline Br. at 22-26; FCC Br. at 32-34. That position is untenable for a number of independent reasons.

First, as discussed above 16-21, the *only* "compelling interests" which might legitimize race-based governmental classifications are (1) appropriate findings of actual discrimination or (2) immediate threats to the public welfare. The vague notion of "increasing program diversity" does not fall into either of these categories. [36]

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[36] The notion of "program diversity" as a "compelling" interest appears to be derived from Justice Powell's opinion in *Bakke*, where he suggested that an academic institution might be justified in implementing race-based criteria in order to assure a diverse student body. Even if Justice Powell's *Bakke* opinion represented the Court's position on the matter, the "program diversity" at issue here is clearly distinct from the "diversity" addressed there.

In Justice Powell's construct, the desired "diversity" would be achieved as an immediate result of the selection process: by picking a certain number of students of particular backgrounds, the academic institution could assure itself of an overall student body profile with a particular mix. The FCC's situation is different: the desired diversity arises, if at all, secondarily, based on the assumption that "minority" owners can and will invariably provide "minority" programming which would not otherwise be available. In this sense the FCC's policy is more akin to the argument, rejected by Justice Powell in *Bakke*, that minority medical school applicants are entitled to preference in order to ensure a sufficient number of doctors willing to serve minority communities. *See Bakke*, 438 U.S. at 310-11.

A related distinction is the fact that applicants to medical school are individuals whose individual, *personal*, attributes (including minority identity) are

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This is not to say that program diversity is not desirable. To the contrary, it is clearly desirable to maximize the free flow of ideas and to promote robust public debate. *E.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945). But it is neither necessary nor desirable for the *government* to undertake the promotion of diversity in a content-related manner. Indeed, the First Amendment itself reflects the contrary position that freedom of expression will flourish best when the government plays no regulatory role whatsoever. U.S. Const. amend. I; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). While non-content-related FCC policies promoting diverse programming have been upheld, the Court has stated that the issue "would be wholly different if 'the Commission [were] to choose among applicants upon the basis of their political, economic or social views.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978), quoting *National Broadcasting Company v. United States*, 319 U.S. 190, 226 (1943).

The Policy is unquestionably "content-related" in precisely that objectionable sense: the Policy's operation is based on the FCC's notion that "minority" licensees will, because of their "minority" identity, perforce provide some kind of "minority programming" which is substantively different from, and preferable to, that which non-"minorities" could provide. Such

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[36](...continued)
clearly discernible and unquestionably permanent. By contrast, the Policy is available to business entities the "minority" character of which may be, at most, purely cosmetic and ephemeral. *See* n.34, *supra*, n.49, *infra*. *See also* Comment, "FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Re-examination of Policy", 138 U.Pa.L.Rev. 401, 440-42 (1990) ("Comment, *Tax Certificates*")(pre-publication proof)(describing issuance of minority tax certificate valued in the range of $100 million where the non-minority individual who arranged for all the financing holds contractual right to acquire the station – WTVT-TV, Tampa, Florida – from Clarence McKee, the supposedly controlling minority who, it happens, was a member of the FCC Taskforce which advocated adoption of the *1978 Policy Statement*.).

content-based favoritism runs *counter* to the First Amendment. *See Buckley v. Valeo*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). [37]

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[37] The FCC's apparent notion that there exists some type of "minority programming" reflecting a "minority viewpoint" is shared by Astroline and various *amici*. *E.g.*, FCC Br. at 35-38; NABOB Br. at 4-5. But at *no* time has the FCC, Astroline or *any amicus* attempted to define for the Court the "minority programming" or the "minority viewpoint" which they believe justifies an otherwise clearly unconstitutional policy. Are *The Cosby Show*, *The Oprah Winfrey Show*, and *Geraldo* "minority programming" because they feature minority personalities? But that standard would encompass *Amos 'n' Andy* and *I Love Lucy*, which might not be deemed "minority programming" by the *amici*. Was *Roots* "minority programming", even though it was produced by a "white"-owned company, distributed by a "white"-owned television network, and broadcast in 1977, the year *before* the *1978 Policy Statement*?

The failure of the FCC *et al.* even to attempt a definition is not surprising, because any effort to define "minority programming" and "minority viewpoint" reveals immediately the fallacy of those concepts. Essential to those concepts is the assumption that *any* "minority" person, by virtue *solely* of her or his race or ethnicity, will *invariably* impart some inherent "viewpoint" to programming which *no* non-minority person could. Such a notion is nothing but racism, albeit cloaked in a benign disguise. The assumption that all members of any race will think or act in any common way merely because of their common race is thoughtless, invidious stereotyping which runs counter to common sense and experience. The fact that some white persons may belong to the Ku Klux Klan does not support the conclusion that *all* whites -- or even many whites -- also belong. By the same token, the fact that some blacks (including as prominent a figure as Jesse Jackson, *see* B. Faw & N. Skelton, *Thunder in America*, 47-80 (1986)) may refer to Jews as "Hymies" does not support the conclusion that all blacks do so.

The Policy is especially objectionable not only because it is based on such fundamentally wrong-headed assumptions, but also because it then assigns qualitative values to those assumptions. The result, in the FCC's eyes, is that the programming which *any* "minority" person is presumed to be ready, willing and able to broadcast is preferable to the programming which any non-minority person would provide. Such a proposition is unsupported in experience, invalid in theory, and inconsistent with the Constitution.

See also nn.50, 51, *infra*, and accompanying text.

Far from supporting the Policy, First Amendment considerations counsel strongly *against* the Policy. The FCC is thus in an inescapable Catch-22 position: if, in order to avoid any conflict with the First Amendment proscription against governmental regulation of content, the FCC were to assert that the Policy is *not* "content-based", then the FCC would be effectively conceding that the Policy cannot rationally be deemed to promote "program diversity" in any meaningful sense; but if the FCC adheres to its "program diversity" claims, then it is effectively conceding that the Policy represents "content-based" regulation inconsistent with the First Amendment.

But even if it is assumed *arguendo* that the promotion of "program diversity" is a "compelling" governmental interest in theory, it is clear that that goal can be achieved without reliance on race-based schemes. The FCC itself has repeatedly rejected narrowly-tailored, non-race-based, content-neutral governmental mechanisms to promote diversity *not* because those mechanisms were ineffective, but because they were, in the FCC's own view, *unnecessary*. [38] Thus, the FCC apparently does not believe

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[38] *See, e.g., Deregulation of Radio*, 84 F.C.C.2d 968, 1066 (1981)("all types of minority needs, be they racial, ethnic, or taste, can be and indeed are being well met through increasing the number of stations"); *Deregulation of Commercial Television*, 98 F.C.C.2d 1076, 1087 (1984)("market demand is determining the appropriate mix of . . . programming", resulting in an appropriate overall "programming mix"); *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 221, 225 (1985)(FCC believes that "sufficient amounts of programming covering controversial issues of public importance" will be provided by available media systems and that "[t]he public has access to a multitude of viewpoints without the need or danger of regulatory intervention"); *Development of Policy re Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 863 (1976)(the radio marketplace, rather than administrative fiat, "is the best available means of producing the diversity to which the public is entitled").

Also, in order to promote diversity, the FCC has adopted multiple ownership rules which limit, *inter alia*, the number of broadcast stations any one individual or entity can hold. *See* 47 C.F.R. §73.3555. The goal of program diversity could be achieved by the race-neutral, content-neutral means of

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that the promotion of program diversity warrants even limited, well-defined, race-neutral, case-by-case administrative involvement. In light of this, the FCC cannot legitimately claim that its interest in "program diversity" is so compelling as to justify a blunderbuss, racially exclusive policy such as the Minority Distress Sale Policy.

B. *The Policy Is Not "Narrowly Tailored" to Achieve Program Diversity.*

But even if "program diversity", in the abstract, could be deemed *arguendo* to be a "compelling interest" for the purposes of strict scrutiny analysis, that asserted justification fails the second element of the analysis. Far from being "narrowly tailored", the Policy bears absolutely no relationship to the supposed goal of program diversity. Assessed objectively, the Policy is nothing more than race-based redistribution of economic opportunities, an administrative attempt to give "minorities" a "piece of the action". *See Fullilove*, 448 U.S. at 536 (Stevens, J., dissenting). [39]

The Policy offers *no assurance whatsoever* that program diversity will, or even may, be increased. The FCC itself has repeatedly conceded that, prior to 1987, no record existed in support of the crucial assumption that "minority ownership" will inevitably lead to diversity-producing "minority programming".

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[38](...continued)
reducing to one the maximum number of stations which can be held by any individual or entity. Rather than take that approach, though, the FCC has moved in the *opposite* direction by *relaxing* the maximum limit from seven stations in any service to 12 stations in any service. *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984).

[39] *See* n.31, *supra* and n.49, *infra*.

Steele Brief at 22; *Steele Inquiry*, J.A. 53-56. [40] While the FCC attempted, after making that concession, to develop such a record, Congress prevented it from doing so in the *1987 Appropriations Act*. [41] Thus, the crucial assumption remains unsupported. [42]

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[40] In its Brief here, the FCC generally ignores its earlier representations to the Court of Appeals and, instead, cites in support of its position various materials pre-dating those representations. In so doing, the FCC opens its *bona fides* to serious question: did the FCC misinform the court below (in its *Steele Brief*) and the public (in the *Steele Inquiry*), or is the FCC misinforming this Court? Shurberg recognizes the political difficulties faced by an agency whose appropriations are dependent on annual Congressional approval. But those difficulties do not justify the FCC's blithe, unexplained, see-saw shifts relative to the constitutionally sensitive matters at issue here. At a minimum, those shifts counsel against according *any* deference to the FCC.

[41] Even if some administrative (or legislative) record had been compiled in 1987 in support of the Policy, the fact remains that the agency action which is the subject of this case was taken in December, 1984. As Judge Silberman noted below, it is not clear how "statements made in 1987 can be relevant to the question of whether the distress sale policy was constitutional as applied to Shurberg in 1984." Pet. App. 51a.

[42] Faced with this evidentiary void, Astroline et al. cite various sources including, for example, the Report of the National Advisory Commission on Civil Disorders ("Kerner Report"), which was issued more than 20 years ago. Astroline Br. at 46-46. But in view of the FCC's 1986 assertions that no record support for the assumed minority ownership/minority programming nexus had theretofore been developed, *Steele Brief* at 22, *Steele Inquiry*, J.A. 53-56, reliance on any pre-1986 sources, including the Kerner Report, contradicts the FCC, which itself formulated the Policy. Moreover, the Kerner Report is in any event badly out-dated: while some vestiges of discrimination may still be found in some areas of society, the "absence of Negro faces" in the broadcast press noted by the Kerner Commission (and now relied on by the FCC, FCC Br. at, *e.g.*, 28) seems to be a thing of the past. For example, a cursory review of Washington, D.C. television stations' news programs indicates that blacks presently hold as many as 50% of the on-air news anchor and reporting positions on those stations. Further, in view of the unique history of blacks in American society, any findings based on that history cannot legitimately be transposed to the benefit of other groups whose histories wholly differ, in

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In any event, if program diversity through "minority programming" is the goal of the Policy, the Policy is not at all tailored to achieve that goal. A "minority" applicant seeking to acquire a station pursuant to the Policy need assert *only* that the applicant is "minority-controlled". [43] A "distress sale" applicant is *not* required to commit itself to, or even to tentatively propose, *any* particular type of programming in any particular amount. [44] A "distress sale" applicant is *not* required to commit that *any* minority principal(s) will be involved in *any* way

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[42](...continued)
nature and degree, from the history of blacks.

The FCC and others also claim that a Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988), reveals some link between minority ownership and minority programming. *E.g.*, FCC Br. at 26. That Report was prepared in June, 1988, ten years after the Policy was adopted, almost four years after the agency action on appeal here, and six months after passage of the *1987 Appropriations Act*. It may be ignored here as a belated effort to make a showing which (if it could be made at all) should have been made a decade ago. Even if the Report's substance is considered, the Policy fares no better. The Report has been correctly criticized as so seriously flawed, conceptually and definitionally, as to be completely unreliable. *Winter Park*, 873 F.2d at 358-67 (Williams, J., dissenting).

[43] It bears repeating that while the FCC imposes this minimal requirement, the FCC does not appear even to care whether minorities are in *actual* control of the applicant, as long as the applicant makes the self-serving assertion that it is "minority-controlled". *See* n.9, *supra* and accompanying text.

[44] By contrast, in other broadcast licensing contexts, the FCC historically considered, and relied on, an applicant's programming commitments, including commitments involving "specialized programming" directed to minorities. *See Deregulation of Radio*, 84 F.C.C.2d at 975 (describing quantitative commercial radio nonentertainment programming guidelines, since deregulated as unnecessary); *Deregulation of Commercial Television*, 98 F.C.C.2d at 1078 (describing history of quantitative commercial television nonentertainment programming guidelines, since deregulated as unnecessary); *George E.Cameron Jr. Communications*, 71 F.C.C.2d 460, 464-66 (1979).

in the station's programming. [45] A "distress sale" applicant is *not* required to demonstrate that there is a need for any particular type of programming in the station's service area. [46] A "distress sale" applicant is not required to be a resident of, or even remotely familiar with, the community in which the subject station is located. [47] A "distress sale" applicant is *not* required to commit to the employment of any particular quota of minorities. [48] A "distress sale" applicant is *not* required to

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[45] By contrast, in the comparative licensing process, a "minority-controlled" applicant may obtain enhanced comparative credit from its "minority" identity *only* to the extent that that applicant can demonstrate that its minority principal(s) will in fact be involved in the station's day-to-day management. *E.g.*, *Las Misiones de Bejar Television Co.*, 93 F.C.C.2d 191, 194 (Rev. Bd. 1983).

[46] By contrast, in the comparative licensing context, before the FCC will consider awarding enhanced comparative credit for a "specialized programming" proposal, the applicant advancing the proposal must make a threshold showing that there is a "need" for such programming. *George E. Cameron Jr. Communications*, 71 F.C.C.2d at 464-465.

[47] By contrast, in the comparative licensing context, the FCC has stated that minority status and local residence (irrespective of race) are factors of "equal significance" in their possible effect on programming. *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941 (1985).

[48] The FCC's Rules do require broadcast licensees to hire on a non-discriminatory basis and to make affirmative efforts to recruit minority job candidates. *See* 47 C.F.R. §73.2080. But, contrary to the unsupported claims of, *e.g.*, *Amicus* NABOB (NABOB Br. at 5), minority owners do not necessarily hire minorities of their own race or ethnicity. For example, since 1986 Cook Inlet Communications, Inc. ("CICI"), a company owned by Alaska natives, *see 1989 Senate Subcommittee Hearing*, 6 (Testimony of Roy M. Huhndorf) ("Huhndorf Testimony"), has availed itself of the minority tax certificate policy to obtain the licenses of two television stations – one in Nashville, TN, the other in New Haven, CT – and eleven radio stations in: Morningside, MD; Provo, UT; Scottsdale, AZ; Atlanta, GA; Houston, TX; Boston, MA; Chicago, IL; and Seattle, WA. The Annual Employment Reports (FCC Form 395) filed with the FCC by each of these stations reflects that *none* of them has *any* full-time employees who are Alaska natives; of a total of 453 full-time and part-time

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retain the station for more than one year (*see Amendment of Section 73.3597 of the Commission's Rules*, 99 F.C.C.2d 971, 974 (1985)), or to sell it only to a buyer committed to "program diversity". [49] Following a distress sale, the FCC makes no *post hoc* effort to determine whether the "distress sale" purchaser has, in fact, increased programming diversity. [50]

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[48](...continued)
employees reported by CICI at all of its stations, only one part-time employee is listed as an Alaska native. *See* Resp. Supp. 122 *et seq.*

[49] In fact, the FCC's Review Board has found that one distress sale buyer abused the distress sale process by "acquir[ing] four 'distressed' radio stations through the [Minority Distress Sale] process with the express intent of bringing minority ownership and participation to only one of the four stations." *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6352 (Rev. Bd. 1988). The individual distress sale buyer in that case was also the buyer of two other distress sale stations. *Id.* at 6343. That is, the individual who was the approved distress sale buyer in 16% of all the distress sales granted by the FCC was found to have abused the distress sale process. *See also* Comment, *Tax Certificates*, 138 U.Pa.L.Rev. at 440-42.

[50] The record of this case illustrates what such follow-up monitoring would likely show. After one year of operation, Astroline voluntarily provided the FCC with a summary of its programming. That summary indicated that Astroline had in fact broadcast a relatively slight amount of Spanish-language programming (far less than the full-time Spanish-language television service which was then, and still is, operating in Hartford). J.A. 24-27. But Astroline, supposedly controlled by a non-black Hispanic, also touted the fact that it had provided "minority" programming (J.A. 25), by which it appears to have meant programming aimed at a black audience. The programs included in that showing were: *Soul Train* (a music and dance program akin to *American Bandstand*); *Julia* (a syndicated program produced in 1968-1971, featuring Diahann Carroll as a nurse); and *Essence* (a weekly program akin to *Entertainment Tonight*, focusing on "major Black celebrities", J.A. 25). Astroline also touted its "local" programming, which consisted primarily of telecasts of the local professional ice hockey team, a local college basketball team, and *Pepsi Duckpin Challenge*, a bowling show. J.A. 25. It is therefore far from clear that Astroline's racial or ethnic identity, whatever it might be, resulted in any increase in program diversity which could not have been achieved by any other licensee regardless of its racial or ethnic composition.

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A more fundamental consideration further undermines the assertion that the Policy is narrowly tailored to promote program diversity. That assertion is based on the predictive notion that minority ownership will ineluctably result in a kind of "diversity" which cannot be achieved through non-race-based means. But that notion is plainly racist, since it blindly assumes that various "minority" groups may be viewed as homogeneous monoliths and that the "diversity" which *any* member of *any* of those groups might provide is somehow preferable to that which *any* non-minority person could provide. Such notions are totally inconsistent with the guarantee of equal protection which the Constitution affords to *individuals*, not to races or ethnic groups. *See Fullilove*, 448 U.S. at 526 (Stewart, J., dissenting), *citing Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). There is no difference between "minority" and non-"minority" persons with respect to their inherent ability to enhance program diversity. This principle is identical to that advanced by the Appellants in *Brown v. Board of Educ.*, who observed that "[w]hatever differences exist in this regard are individual and not racial." Appellants' Statement as to Jurisdiction in *Brown v. Board of Educ.*, No. 51-1, at 12. [51]

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[50](...continued)
This is not unique to Astroline. An officer of CICI, the company owned by Alaska natives (*see* n.48, *supra*), testified before the Senate Telecommunications Subcommittee that CICI "do[es] not seek to dictate programming decisions with a view to ensuring the expression of Native American viewpoints and sensitivity to minority viewpoints generally." *1989 Senate Subcommittee Hearing*, 5 (Huhndorf Testimony).

[51] By effectively dividing society into two groups, *i.e.*, "minority" and "non-minority", the FCC also seems to assume that the various distinct racial or ethnic components of the "minority" portion of society are all themselves fungible and able to serve one another better than could any non-minority. This is illustrated by Astroline's claims concerning its non-Hispanic programming. *See* n.50, *supra*. But what basis is there to say, for example, that an Hispanic licensee can serve a black audience "better" than a white licensee? Indeed, the ability of a *non*-minority licensee to provide "superior" and "extraordinary" public service to an Hispanic audience has been established. *See Tele-*

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The FCC's adoption of this approach thus serves the unfortunate purpose of reinforcing racial stereotypes by demonstrating implicitly that

> the apportionment of rewards and penalties can legitimately be made according to race -- rather than according to merit or ability -- and that people can, and perhaps should, view themselves and others in terms of their racial characteristics.

Fullilove, 448 U.S. at 532 (Stewart, J., dissenting). Such further atomization of our society according to race and ethnicity is precisely what the guarantee of equal protection was intended to prevent.

IV. The Court of Appeals Did Not Improperly "Disregard" Any Action of the Congress.

Astroline and its supporters argue that the Court of Appeals below improperly "disregarded" Congress' "express approval and adoption" of the Policy. *E.g.*, Astroline Br. at *i*. This argument is wrong on a number of counts.

A. *Congress Has Never "Expressly Approv[ed] and Adopt[ed]" the Minority Distress Sale Policy.*

First, Astroline is incorrect when it suggests that Congress has *ever* "expressly approv[ed] and adopt[ed]" the Policy: Congress has never codified the FCC's Minority Distress Sale Policy. [52]

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[51](...continued)
Broadcasters of California, Inc., 58 Rad. Reg. 2d (P&F) 223, 231 (Rev. Bd. 1985). *See also Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 635 n.70 (Rev. Bd. 1984)(non-minority licensee credited with service to black audience).

[52] In fact, at least one proposal specifically designed to codify, *inter alia*, the Policy has failed. H.R. 1090, 100th Cong., 1st Sess. (1987).

The *only* Congressional action which is even arguably relevant here is the *1987 Appropriations Act*, the relevant portion of which is quoted at n.12, *supra*. [53] The *1987 Appropriations Act* did not purport to codify the Policy. At most it merely instructed the FCC, first, to abandon its then on-going *Steele Inquiry* and, second, to maintain the *status quo ante*. Because the provision was included in an appropriations measure, it is by its very nature temporary. This is hardly the "approv[al] and adopt[ion]" which Astroline suggests. [54]

B. *Congress' Action Does Not in Any Event Cure the Policy's Unconstitutionality.*

Even if the substance of the 1987 Appropriations Act were to be interpreted in the light most favorable to Astroline, it would still not correct the obvious constitutional flaws in the Policy.

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[53] Astroline, the FCC and others argue that Congressional action in 1982 is relevant to the Policy. *E.g.*, FCC Br. at 23. But the Congressional action relied on included no consideration whatsoever of the Policy itself. At most, the *1982 Conference Report* contained a passing citation to the FCC's *1978 Policy Statement*, without any reference at all to the Minority Distress Sale Policy. *1982 Conference Report*, 44. Since Congress did not even mention, much less "approve" and "adopt", the terms of the Policy in 1982, Congress' 1982 action cannot properly carry the load which the FCC *et al.* attempt to impose on it.

[54] Justice Stevens has suggested that judicial review of race-based legislation may focus in particular on underlying legislative procedures. *Fullilove*, 448 U.S. at 550-51 (Stevens, J., dissenting). Here, the narrow FCC-related provision was buried in a massive appropriations act affecting the entire Federal government. The limited available legislative history reflects little or no detailed consideration by either house of Congress. This is a far cry from the situation in *Fullilove*, where the Court relied on extensive legislative history reflecting a "considered decision" of Congress. *See Fullilove*, 448 U.S. at 463-67, 473 (opinion of Burger, C.J.). Continued lack of consideration is also apparent in the fact that the two subsequent appropriations acts which have maintained the 1987 language call, in identical language, for the termination of the FCC's *Steele Inquiry*, even though the FCC terminated that proceeding two years ago.

1. *Congress' Action Was An Impermissible Legislative Invasion Of The Adjudicatory Process.*

The FCC action on review in this case was taken in December, 1984. Shurberg immediately appealed that action, specifically challenging, *inter alia*, the constitutionality of the Policy. The case (including that issue) had been briefed and argued to the Court of Appeals by January, 1986. In 1987, the Court of Appeals remanded only the record of the case, *see* D.C. Cir. R. 15(c), for the specific, limited purpose of permitting the FCC (at the FCC's own urging) to undertake further inquiry into the constitutionality of the Policy.

It appears from one published report that Astroline then undertook a substantial lobbying effort designed to short-circuit the further adjudication of this case. J.A. 85. That lobbying effort reportedly resulted in the particular language of the *1987 Appropriations Act* relating to the FCC's minority ownership policies. *Id.* That language, arguably the result of a politically-motivated spoils system, was designed to preclude FCC review of the Policy's constitutionality and to provide, *post hoc* and *nunc pro tunc*, an apparent Congressional imprimatur for the Policy. The Act is thus nothing more than a *post hoc* legislative attempt to affect the outcome of a particular adjudicatory proceeding, pending before an Article III court, by retroactively considering an agency policy which, prior to Shurberg's challenge initiated three years earlier, had not been considered at all by Congress. Such legislative intrusion into on-going adjudication is inconsistent with the constitutional separation of powers and with Shurberg's right to due process. *See United States v. Klein*, 80 U.S. 128, 145-48 (1872) [55]; *Pillsbury Co. v.*

[55] *See also* Judge Silberman's opinion below, Pet. App. at 50a, n.39 ("there is little difference between stripping a court of jurisdiction and stripping the Executive Branch or an independent agency of authority to comply with orders of the court. *Cf. United States v. Klein*, 80 U.S. 128, 145 (1872) (Congress exceeds power under exceptions clause when 'language of the [statute] shows (continued...)

FTC, 354 F.2d 952, 964 (5th Cir. 1966). [56] While Congress is certainly able to enact legislation having *prospective* effect, [57] it should not be permitted to act in a manner clearly designed retroactively to shore up the arguments of a particular litigant in a particular pending case, especially when the proponent of the action is the litigant benefited thereby.

In view of the clear unfairness inherent in Congress' attempt to change the rules retroactively, that portion of the *1987 Appropriations Act* can and should be ignored in the disposition of this case.

2. *The 1987 Appropriations Act Does Not Correct the Constitutional Flaws of the Policy.*

Even if the 1987 Appropriations Act could properly be considered in this case, it would not save the Policy. As discussed above, any race-based governmental classification is presumptively unconstitutional unless narrowly tailored to address a compelling interest. *See supra*, 14-21. This analysis is not substantially altered by the fact that the *1987 Appropriations Act* is an act of Congress. *See* n.16, *supra*. [58] This is especially

[55](...continued)
plainly that it does not intend to withhold jurisdiction except as a means to an end."); *Ex Parte McCardle*, 74 U.S. 506 (1869).").

[56] Lest there be any question of Congress' intrusive intent with respect to the instant case, *see* S. Rep. No. 182 100th Cong., 1st Sess. 77 (1987)(instructing the FCC to affirm its grant of the Faith Center/Astroline distress sale); *1986 House Subcommittee Hearing* at, *e.g.*, 57 (Rep. Collins polls FCC Commissioners on "what do you think you are going to do in . . . the *Shurberg* case?").

[57] *See, e.g., Croson*, 109 S.Ct. at 731 (Stevens, J., concurring).

[58] *See also Fullilove*, 448 U.S. at 496 (Powell, J., concurring). The decision in *Fullilove* does not undermine this principle. Particularly in view of the fact (continued...)

so in view of the fact that the *1987 Appropriations Act*, by its own terms, was intended to ossify the Policy, not to correct any of its multiple infirmities.

According to the language of the Conference Report accompanying the *1987 Appropriations Act*, Congress perceived the purpose of the FCC's minority ownership policies to be the promotion of diversity in programming. *1987 Senate Report* at 76. But that purpose cannot be deemed a "compelling interest" sufficient to justify race-based classifications. *Supra*, 16-21, 33-38. And even if it were deemed, *arguendo*, to be "compelling", the

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[58](...continued)
that no single opinion in *Fullilove* commanded a majority of the Court, it is difficult to divine any governing standards therefrom. At most, *Fullilove* stands for the proposition that, where a facial challenge is directed to a Congressional action, and where that Congressional action was taken pursuant to Section 5 of the Fourteenth Amendment in an effort to remedy prior discrimination at the State level as to which an adequate legislative record had been compiled, the Congressional action may be upheld if it is "narrowly tailored" to correct the effects of that prior discrimination. Each of the factors cited in the preceding sentence -- *i.e.*, the facial nature of the challenge, the source of constitutional authority relied upon by Congress, the remedial nature of the legislation, the existence of a record of discrimination at the State level, the narrowness of the legislation -- appears to have been crucial to the disposition of *Fullilove*. *See, e.g., id.*, 448 U.S. at 490 (Burger, C.J.) and 499 (Powell, J., concurring).

The instant case is distinguishable from *Fullilove* on each of those crucial factors. This challenge involves both a facial challenge and an "as applied" challenge to the Minority Distress Sale Policy. To the extent that Congress may be said to have considered that Policy at all, it did *not* seek to remedy past discrimination at the State level, but to promote diversity in programming; Congress was not acting pursuant to the remedial authority encompassed in the Fourteenth Amendment. Congress relied on virtually no record whatsoever establishing discrimination in the broadcast licensing process. And finally, the Minority Distress Sale Policy is not at all "narrowly tailored" either to address any possible discrimination *or* to promote program diversity.

Thus, even if *Fullilove* continues to have any precedential value outside of its own very constricted factual setting, it does not alter the clear fact that the Minority Distress Sale Policy is unconstitutional even if Congress may be deemed, *arguendo*, formally to have "approv[ed] and adopt[ed]" it as alleged by Astroline.

Policy would still have to be "narrowly tailored" to address that interest; Congress took no steps whatsoever to alter the undeniable fact that the Policy is not at all so tailored. Rather, it simply mandated a temporary return to the situation *status quo ante*, which situation was, as discussed above, inconsistent with the Constitution.

CONCLUSION

The constitutional guarantee of equal protection establishes two fundamental parameters which govern the nation's social and political ecologies: all individuals are presumed to be equal, and the government *must* treat them so. These parameters limit the government, but free the individual to compete on his or her own merits, to succeed or fail according to his or her abilities. To be sure, historically the ideals embodied in that guarantee were not universally honored; but the inclusion of the guarantee in the Constitution reflects the nation's determination that those ideals can, should and must be honored.

The concept of equal protection assumes that all persons will enjoy equal opportunities free of discrimination. Where the premise of nondiscrimination is invalid, the government may take appropriate remedial action designed to restore to the particular victims of the discrimination the equal opportunities of which they have been deprived, and thus to restore the validity of the premise. But the authority to act in such instances is of necessity narrowly confined to remedial measures directed to specific instances of discrimination. Without such a restriction, the delicate balance of our social and political ecologies would be grievously threatened: an individual's right to equal treatment by the government -- a right which should be immutable -- would be subject to quicksilver shifts in public sentiment, as one racial or ethnic group after another would seek and, possibly, secure preferred treatment based on factors which the Constitution now declares irrelevant. The result would be the antithesis of equal protection.

The FCC's Policy is clearly an unnecessary, non-remedial, and therefore unconstitutional, race-based classification as a result of which Shurberg has suffered because of Alan Shurberg's race. The nation would be well-served if the Court would unmistakably declare that such classifications cannot co-exist with the guarantee of equal protection. The lack of any such unmistakable declaration to date has led only to confusion and delay, as evidenced by the multi-year deliberations of the court below which resulted in three lengthy separate opinions. Both in the narrow context of this case and far beyond its horizons, the lack of clear standards has forced -- and will continue to force -- individual parties such as Shurberg to run marathon legal gauntlet after marathon legal gauntlet to achieve that which the Constitution already guarantees. It is essential now that this Court make clear that private, parochial interests cannot be permitted to override those most fundamental society-wide interests embodied in the constitutional guarantee of equal protection.

The judgment of the court of appeals should be affirmed for the reasons stated.

Respectfully submitted.

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